Mr. B. IGA, Inc. *and* District Union 271 of the United Food & Commercial Workers International Union, AFL-CIO, CLC. Case 17-CA-9961

May 5, 1981

DECISION AND ORDER

Upon a charge filed on October 8, 1980, by District Union 271 of the United Food & Commercial Workers International Union, AFL-CIO, CLC, herein called the Union, and duly served on Mr. B. IGA, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on November 21, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the National Labor Relations Act, as amended. The complaint was amended by the Regional Director on November 28, 1980. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint, as amended, alleges in substance that on February 1, 1980, following a Board election in Case 17-RC-7989 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about July 24, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so; and that commencing on or about September 10, 1980, and at all times thereafter, Respondent has refused to furnish information requested by the Union regarding the name of each employee in the bargaining unit and his or her address, seniority date, classification, rate of pay, insurance policy, and employee's contribution, if any, number of holidays, amount of vacation, rest periods, overtime pay policy, and other benefits these employees presently have, which information is necessary for collective bargaining. On November 25, 1980, Respondent filed its answer to the complaint and on December 8, 1980, filed an amended answer, admitting in part, and denying in part, the allegations in the complaint, as amended, and asserting as an affirmative defense that it has no current obligation to bargain with the Union because of the unusual circumstances surrounding the issuance of certification and the changed conditions within the unit, to wit, lengthy delays between the election and certification, the sale of three of the four stores in the unit and the resulting diminution of the unit from 19 to 3 employees, and the complete turnover of employees in the unit since the election.

On December 23, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a Motion for Summary Judgment and a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motions for Summary Judgment

In its answer to the complaint, as amended, its Motion for Summary Judgment, and response to the Notice To Show Cause, Respondent basically contends that certification was not appropriate herein because of a lengthy delay in the processing of its objections which, according to Respondent, lead to "unusual circumstances" precluding certification.

Our review of the record herein, including the record in Case 17-RC-7989, reveals that pursuant to a Decision and Direction of Election, an election was conducted on June 17, 1976, and resulted in a 10-to-6 vote in favor of the Union, with 3 challenged ballots. Respondent filed timely objection and supplemental objections to conduct affecting the results of the election. On August 24, 1976, the Regional Director found that certain of the objections set forth raised substantial and material issues of fact and law which could best be resolved after a hearing and, accordingly, issued the appropriate notice of hearing. A hearing was held October 5 and 18, 1976, and on November 4, 1976, the Hearing Officer issued his report on objections with findings and recommendations wherein he recommended that the Employer's objections be overruled and that a certification of representative be issued to the Union. On November 4, 1976, Respondent filed exceptions to the Hearing Officer's report.

On February 1, 1980, the Regional Director issued a Supplemental Decision on Objections and

[1] Official notice is taken of the record in the representation proceeding, Case 17-RC-7989, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Certification of Representative wherein he adopted the findings and recommendation of the Hearing Officer and explained that the Employer's exceptions had been inadvertently misplaced, due, in part, to the transfer of the Hearing Officer out of the Regional Office the day after his report issued. Respondent filed a timely request for review of the Regional Director's Supplemental Decision and a motion to dismiss and, on March 20, 1980, the Board issued a Notice To Show Cause and order granting review. In its motion to dismiss Respondent argued that a substantial question of Board policy was raised by the Supplemental Decision since affirmance of that Decision would have resulted in the certification of an inappropriate unit. Respondent further argued that the Supplemental Decision was based upon an outdated and erroneous factual record in that (1) more than 3-1/2 years had passed since the election; (2) during that period of time three of the original four stores in the unit had been sold to unrelated entities; (3) during that period of time the unit had been reduced in size from 19 to 3 employees; (4) since the election had been held in a larger unit, there had never been any showing of majority in the single store remaining in the unit; and (5) only 1 employee eligible to participate in the election remained employed in the unit. Respondent attached an affidavit in support of its assertion that the unit had been reduced in size.

The Union filed a timely response to the Notice To Show Cause in which it contended that the delay of nearly 4 years had not been caused by the Union, that Respondent had not fulfilled its bargaining obligations, that the contraction of the unit and turnover of employees had not relieved Respondent of its duty to bargain, and that the Union had been denied the right to represent and bargain on behalf of the employees in the unit.

On June 16, 1980, the Board, then-Member Truesdale dissenting, affirmed the Regional Director's Supplemental Decision on Objections and Certification of Representative, but amended the certification to reflect the Union's current designation. The Board explained that, despite the alleged contraction of the unit, the original unit had not been shown to have been rendered inappropriate. Furthermore, the Board stated, the language of Section 9(c)(1) of the Act is mandatory and requires that the Board "shall certify" the results of a duly conducted secret-ballot representation election.

In its Motion for Summary Judgment and its response to the General Counsel's motion, Respondent again raises the delay of more than 3 years, the sale of three of the four stores, the reduction of the number of employees in the unit from 19 to 3, and the turnover of employees in the unit. Despite Respondent's assertion that these issues were not considered by the Board or were not determined by the Board during the representation proceedings, the Board's affirmance of the Regional Director's Supplemental Decision clearly indicates that these issues have been considered but have been found not to bar certification. In addition, Respondent now argues that the Union acquiesced in the delay, citing footnote 3 of the Regional Director's Supplemental Decision that "no party made any inquiry until January 15, 1980." This issue was raised and litigated by Respondent during the representation proceedings. The Board has considered this issue and has found that certification is not barred by reason of any purported acquiescence by either party.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it adequately support its claim that special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[3] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a State of Nebraska corporation, is engaged in the operation of a retail grocery store at 48th Street and VanDorn in Lincoln, Nebraska. In the course and conduct of its business operations within the State of Nebraska, Respondent annually purchases goods and services valued in excess of

[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] Member Zimmerman, who did not participate in the underlying representation case, considers himself bound to grant summary judgment in this case without regard to the merits of the issues which Respondent now attempts to relitigate for the reasons stated in his concurrence in *Bravos Oldsmobile*, 254 NLRB No. 135 (1981).

$10,000 from sources located outside the State of Nebraska and receives gross revenues in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

District Union 271 of the United Food & Commercial Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time meat department employees, including meat department managers, employed by Mr. B. IGA, Inc., at its Lincoln, Nebraska grocery stores but excluding office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

2. The certification

On June 17, 1976, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 17, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on February 1, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 24, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 24, 1980, and continuing at all times thereafter to date, Respondent had refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Commencing on or about September 10, 1980, and at all times thereafter, the Union, by letter, has requested Respondent to furnish the Union with the name of each employee in the bargaining unit with his or her address, seniority date, classification, rate of pay, insurance policy and employee's contribution, if any, pension plan, if any, number of holidays, amount of vacation, rest periods, and overtime pay policy, and any other benefits these employees presently have. This information is necessary for and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees. Since on or about September 10, 1980, Respondent has failed and refused to furnish the Union the information described above.

Accordingly, we find that Respondent has, since July 24, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, Respondent has, since September 10, 1980, and at all times thereafter, refused to supply information requested by the Union, which information is necessary for collective bargaining, and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstruction commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall also order Respondent to supply the information, necessary for collective bargaining, requested by the Union.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Mr. B. IGA, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District Union 271 of the United Food & Commercial Workers International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time meat department employees, including meat department managers, employed by Mr. B. IGA, Inc., at its Lincoln, Nebraska, grocery stores but excluding office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 1, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 24, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing on or about September 10, 1980, to supply information requested by the Union including the name of each employee in the bargaining unit with his or her address, seniority date, classification, rate of pay, insurance policy and employee's contribution, if any, pension plan, if any, number of holidays, amount of vacation, rest periods, and overtime policy, and any other benefits these employees currently have, which information is necessary for collective bargaining, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mr. B. IGA, Inc., Lincoln, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District Union 271 of the United Food & Commercial Workers International Union, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time meat department employees, including meat department managers, employed by Mr. B. IGA, Inc. at its Lincoln, Nebraska grocery stores but excluding office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Refusing to supply the above-named Union with information necessary for collective bargaining, including the name of each employee in the bargaining unit with his or her address, seniority date, classification, rate of pay, insurance policy and employee's contribution, if any, pension plan, if any, number of holidays, amount of vacation, rest periods, and overtime policy, and any other benefits these employees presently have.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, supply the above-named Union with information necessary for collective bargaining, including the name of each employee in the bargaining unit with his or her address, seniority date, classification, rate of pay, insurance policy and employee's contribution, if any, pension plan, if any, number of holidays, amount of vacation, rest periods, and overtime policy, and any other benefits these employees presently have.

(c) Post at Respondent's retail store in Lincoln, Nebraska, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District Union 271 of the United Food & Commercial Workers International Union, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply the above-named Union with information necessary for collective bargaining, including the name of each employee in the bargaining unit with his or her address, seniority date, classification, rate of pay, insurance policy and employee contribution, if any, pension plan, if any, number of holidays, amount of vacation, rest periods, and overtime policy, and any other benefits these employees presently have.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time meat department employees, including meat department managers, employed by us, at our Lincoln, Nebraska grocery stores but excluding office clerical employees, casual employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL, upon request, supply the above-named Union with information necessary for collective bargaining, including the name of each employee in the bargaining unit with his or her address, seniority date, classification, rate of pay, insurance policy and employee contribution, if any, pension plan, if any, number of holidays, amount of vacation, rest periods, and overtime policy, and any other benefits these employees presently have.

MR. B. IGA, INC.